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IN THE

Supreme Court of the United States

October Term, 1935.

No. 339

DE FOREST HULBURD,

Petitioner.

v.

GUY T. HELVERING, Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONER.

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INDEX.

	Page
Petitioner Is Not Liable on the Merits Either As Executor Or As Legatee Because He Did Not Receive Any of the Property of the Taxpayer	4-11
The Discharge of the Executors Prevents the Maintenance of a Proceeding Against Them As Executors	11-14
Respondent Has Misapprehended the Illinois Law	14-22
The Circuit Court of Appeals Should Not Have Considered the Question of Petitioner's Liability As a Legatee and Held That He Was Liable As Such	22-26

TABLE OF CASES.

Annie Temoyan, 16 B. T. A. 923, 925	9
Brewerton v. United States, 9 F. Supp. 504 (Ct. Cl.)	24
Brewster v. Gage, 280 U. S. 327, 337	3
Evans, 12 B. T. A. 334	14
Forrest v. Jack, 294 U. S. 158, 163	12, 13
Gould v. Gould, 245 U. S. 151	3
Helvering v. Brooklyn City R. Co., 72 F. (2d) 274 (C. C. A. 2nd)	24
Hutton, C. A., 21 B. T. A. 101, 105	4
Kaufman case, 15 B. T. A. 141	14
Lindley v. United States, 59 F. (2d) 336 (C. C. A. 9th)	21
Liberman's Committee v. Commissioner, 54 F. (2d) 527, 529	2
Maguire v. City of Macomb, 293 Ill. 441	21
Mortimer v. Potter, 213 Ill. 178	15

Phillips v. Commissioner, 283 U. S. 589 3
Pierce v. United States, 255 U. S. 398, 406 22
Sanders v. Merchants State Bank, 349 Ill. 547, pp. 564, 565, 566 and 567 15-20
Schwab v. Doyle, 258 U. S. 529, 534, 535 3
Starr v. Willoughby, 218 Ill. 485, 491 and 492 ..... 20, 21
Union Pacific R. R. Co. v. Laramie Stock Yards Co., 237 U. S. 190, at page 199 ..... 2, 3
Uncasville Mfg. Co. v. Commissioner, 55 F. (2d) 983 (C. C. A. 2nd) 21
United States v. Magnolia Petroleum Co., 276 U. S. 160, 162 3
Wray, E. J., 24 B. T. A. 94, 96 4

STATUTES.

Revenue Act of 1926, Section 281 (b) 2
Revised Statutes, Section 3467 13

TEXT BOOKS.

Commerce Clearing House Tax Service for 1935, par. 9592 8
Fletcher on Corporations (1933), Sec. 8161 7

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May It Please The Court:

On page 36 of our main brief we emphatically challenged the respondent to point out any words in the law giving the Government the right to a remedy against an executor before the United States Board of Tax Appeals other than *Section 281(b) of the Revenue Act of 1926,* quoted at page 19 of our brief, and at pages 18 to 20 of our brief we discussed this point in detail. We pointed out, at page 21 of our brief, that petitioner had been discharged one year before the enactment of this

section and urged that its words were entirely prospective. For example, it refers to a person who "*is acting* in a fiduciary capacity for a person subject to the liability specified in *Section 280*" and it uses the future tense by saying: "The fiduciary *shall assume,* on behalf of such person," etc.

We pointed out that the Circuit Court of Appeals for the Second Circuit in *Liberman's Committee v. Commissioner, 54 F. (2d) 527, at page 529,* had squarely held that this statute was prospective in effect and was not retroactive. On page 19 of our brief we stated that if we were correct in this contention it was unnecessary for the Court to proceed further before holding that the Act did not contain any authority for the enforcement of a remedy before the Board of Tax Appeals against executors who were not such at the time of its enactment. An examination of respondent's brief does not disclose any answer to this contention.*

The rule against construing ordinary legislation to be retroactive was thus stated by this Court in *Union Pacific R. R. Co. v. Laramie Stock Yards Co., 237 U. S. 190, at page 199:*

> "Construction, therefore, becomes necessary, and the first rule of construction is that legislation must be considered as addressed to the future, not to the past. The rule is one of obvious justice, and prevents the assigning of a quality or effect to acts

* On page 17 of respondent's brief it is said that the Commissioner had at least constructive notice of the discharge "and here he did not". These executors pleaded their discharge in their petition filed with the Board of Tax Appeals (R. 7) and even annexed a copy of their discharge to that petition. The record shows a copy of this petition was served on the Commissioner and he answered it. Although this put him on notice he took no steps to proceed against anyone else. If he has lost any tax, it is wholly due to his own negligence, but as demonstrated in this brief he could not have recovered on the merits even if he had proceeded in time.

> or conduct which they did not have or did not contemplate when they were performed. The rule has been expressed in varying degrees of strength, but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' *United States v. Heth, 3 Cranch 413, 2 L. Ed. 483; Reynolds v. M'Arthur, 2 Pet. 417, 7 L. Ed. 470; United States v. American Sugar Ref. Co., 202 U. S. 563, 577, 50 L. Ed. 1149, 1152, 26 Sup. Ct. Rep. 717; Winfree v. Northern P. R. Co., 227 U. S. 296, 57 L. Ed. 518, 33 Sup. Ct. Rep. 273.*"

It cannot be said that "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature" make this statute retroactive. While the above is the rule which obtains in the construction of ordinary legislation, yet to tax laws, because all doubts are to be resolved in favor of the taxpayer *(Gould v. Gould, 245 U. S. 151)*, it applies with peculiar force. *Schwab v. Doyle, 258 U. S. 529, 534, 535; Brewster v. Gage, 280 U. S. 327, 337; United States v. Magnolia Petroleum Co., 276 U. S. 160, 162.*

In the case of *Phillips v. Commissioner, 283 U. S. 589*, the executor was acting as such at the time he appealed to the Board of Tax Appeals and at the time of the proceeding in this Court. There was no question of the effect of discharge in that case. Hence the question which arises here was not there present.

Furthermore, it has been properly and consistently held by the Board of Tax Appeals that *Section 280* of the statute here relied upon should be strictly construed

against the respondent. In *E. J. Wray, 24 B. T. A. 94, at page 96,* the Board of Tax Appeals said:

> "As we said in *Continental Oil Co., 23 B. T. A. 311:*
>
> The provisions of *section 280* constitute an extraordinary method of collecting the taxes of the person who is primarily liable therefor, and consequently they must be construed strictly against the respondent."

The force is apparent of the following observation in *C. A. Hutton, 21 B. T. A. 101, at page 105:*

> "The laws governing the liability of a transferee are not new. They have been administered in the courts for ages. The essence of such laws is that they give to creditors the right, either in law or in equity, to hold a third person liable for the debts of someone else. The courts have always been strict in applying such a law. To hold one person liable for the debt of another is a rather hard rule."

To construe this section to be retroactive it is necessary to reach the illogical conclusion that it imposed duties upon executors who had ceased to be such a year before it came into existence.

Inasmuch as it does not authorize this proceeding respondent must fail.

PETITIONER IS NOT LIABLE ON THE MERITS EITHER AS EXECUTOR OR AS LEGATEE BECAUSE HE DID NOT RECEIVE ANY OF THE PROPERTY OF THE TAXPAYER.

Although respondent takes this point up last in his brief (apparently putting what he considers his better foot forward first), we reply to it here because it goes to the heart of the case.

On page 27 of respondent's brief, the heading under Point IV is, "Petitioner Is Liable As One Who Holds Property of A Corporation Which Dissolved Owing Unpaid Taxes," but petitioner does not hold any property of the corporation and it was not proved that he did. Hence respondent's premise fails. On page 7 of his brief respondent states that summarizing his argument:

> "Petitioner received funds from the decedent which in turn had been received as a dividend on dissolution of a corporation owing unpaid taxes. These moneys were impressed with a trust in favor of the Government. To the extent that the aggregate of the intermingled fund consisting of the trust funds and those of the decedent or legatee remained intact, the trust funds can be traced."

It was not proved that petitioner received funds which the decedent had received from the corporation. It was not proved that there was any intermingled fund or that any such fund remained intact. For ought that appears the decedent in the years between the receipt of this money and his death may have spent all his money or even overdrawn at the bank and borrowed more money to replace it and later accumulated money to repay the loan and constitute the cash in his estate.

In the last paragraph on page 27 of his brief, respondent states:

> "This liability is often expressed in terms of a trust fund, but the relationship is in reality that of the debtor to his creditor."

No authority is cited for the proposition that the relation is that of debtor and creditor and no such authority can be cited. Because any liability must depend solely on the trust fund doctrine and because none of the fund

was traced into the estate of Hulburd, the respondent could not have recovered without tracing such fund into the estate even if he had filed a claim against the estate during the time it was in existence and petitioner was acting as executor. That this liability depends solely on the trust fund doctrine appears from the cases cited on page 27 of the respondent's brief, which put the liability upon that ground. It appears also from the Report of the Committee of Congress quoted on page 15 of petitioner's main brief, which so stated, and it further appears from the ruling of the Treasury Department quoted at pages 16 and 17 of petitioner's main brief.

At common law, one was not liable for the debt of another unless he had contracted to pay it. There being no liability of decedent at common law, equity jurisprudence must be examined to ascertain if one exists. The courts of equity have not gone so far as to hold that one person is liable for the debt of another in the absence of his contract to pay it. What courts of equity have held by means of the trust fund doctrine is that the debtor may follow the property of the creditor and lay hands on it if found in possession of someone to whom it has been conveyed without consideration. That is the extent of the doctrine. It is somewhat in the nature of an equitable lien and as such is inseparable from the fund to which it attaches.

Cases dealing with the liability of bank stockholders are not in point because there the liability does not depend upon and has no relation to the trust fund doctrine, but is a liability created entirely by statute. *(Forrest v. Jack, 294 U. S. 158.)* In the case at bar respondent concedes, on page 18 of his brief, that the statute herein

involved creates no liability. The liability sought to be enforced here is the old and well known one and depends entirely upon the trust fund doctrine.*

As stated in *Fletcher on Corporations (1933), Sec. 8161,* the creditor tracing trust property must take the property as he finds it. If it has depreciated in value and the depreciation is due to no negligence of the holder, he must take it in its depreciated form. If it has appreciated in value, he is entitled to the benefit of the appreciation.

In the case at bar, the statute quoted on page 12 of our main brief plainly put the burden of proof on the respondent in this proceeding before the Board, not merely to show that the petitioner was a transferee of property of a taxpayer (which he did not show) but placed upon him the heavier burden of showing "that *petitioner is liable* as a transferee of property of a taxpayer." (Italics ours.)

Respondent utterly failed to show that the petitioner was even a transferee of property of a taxpayer. A case squarely in point is *United States v. Myers,* to which the respondent has called the Court's attention at our request, on page 32 of his brief. This case is published in the *Commerce Clearing House Tax Service for 1935* at

* The trust fund doctrine has been criticized by writers and courts on the ground that it has been applied to situations which could have been decided without it. For example, when the capital stock of a corporation has not been paid in full it has been said that the liability in such case could have been put upon the ground of a false representation or fraud and that it was unnecessary to invoke the trust fund doctrine. (Hospes v. N. W. Mfg. Co., 48 Minn. 174.) Where its assets have been distributed by a corporation after it has actual knowledge of the creditor's claim, it has been said that the liability might be put on the ground of a fraudulent conveyance rather than on the ground of the trust fund doctrine. But these criticisms do not fit a case where a corporation innocently distributes its assets without any knowledge of a creditor's claim.

paragraph 9592. In that case the United States sued the Administrators of the Estate of F. E. Myers, deceased. As in the case at bar it merely proved that F. E. Myers during his lifetime had received property of a taxpayer, and rested. The Court properly held this proof entirely insufficient to establish a case, saying:

> "Upon due consideration of the facts stipulated, I think that the equitable relief prayed for by the plaintiff should be denied. This is not a suit to enforce, or recover on, a personal tax liability; it is one to reach the remaining assets of a delinquent and dissolved corporate taxpayer, if any such assets may be found in the hands or control of the administrator of one of the stockholders of the taxpayer who had received his distributive portion at dissolution ten years before the suit was commenced. There is no evidence that any part of the corporate assets are presently possessed by the estate of F. E. Myers, deceased. No attempt at evasion of the tax is asserted and the agreed facts indicate that the responsible agents of the plaintiff knew of the dissolution of the corporate taxpayer approximately eight years before suit was commenced. No assessment of any portion of the corporation's delinquent taxes was ever made against the decedent stockholder.
>
> Judgment may be entered for the defendant and special findings as requested by the defendant will be approved and adopted."

The Government attempts to distinguish this case on page 33 of its brief by saying that in that case the burden of proof rested on the Government, whereas "here the burden seems properly to rest upon petitioner." That is a misapprehension for as we have said the statute quoted on page 12 of our main brief places the burden squarely upon the respondent in these proceedings before the Board of Tax Appeals. He must prove exactly the same things he would have to prove in a suit in court.

In the case of *Annie Temoyan, 16 B. T. A. 923,* the Board of Tax Appeals took this view and held that proof that the decedent during his lifetime had received assets of a taxpayer fell far short of meeting the burden of proof imposed upon the respondent by the statute, quoted at page 12 of our main brief. In that case the petitioners as trustees, held property of the decedent but it was not proved that any of the taxpayer's property was included in the property held by them. The Board said at page *925:*

> "If the funds of the company could be traced through the estate of John Temoyan and a part into the hands of Hormig Temoyan, what part of such funds did the petitioners receive?
>
> It is evident that the statute places a real burden on the Commissioner. He must establish the liability of the transferee against whom he proposes to proceed. He must establish all facts necessary to show that there is a liability at law or in equity on the part of that transferee for the payment of the whole or a part of the liability. This burden is not met by such an indifferent showing of the facts as we have here."

We know of no case where an estate of a deceased transferee has been held liable for the debts of a corporation unless it was proved that it received property of the corporation, except the case at bar in which the Circuit Court of Appeals expressly stated in the quotation from its opinion on page 14 of our main brief that there was no liability on any Trust Fund theory, but assumed that one was "created and defined by the statute." The respondent forced to admit that none is created and defined by the statute, is compelled on page 18 of his brief to argue that the language of the Court below "may not be particularly apt" and that the Court did not mean what it thereby said.

On page 30 of respondent's brief it is said that equity presumes "the money of the rightful owner is the last to be withdrawn from the intermingled fund." There is no basis here to apply this rule because it was not proved that there was any intermingled fund, or if there was one that it remained intact and was not completely expended by decedent before he died, or transferred by him without consideration to another person during his lifetime. This situation brings the case squarely within the scope of the quotation from the decision of this Court on page 30 of our main brief. On page 30 of its brief respondent attempts to distinguish this case relied upon by us by saying:

> "There the claimant was unable to trace his money into any specific fund and he failed to show that any specific fund, as opposed to the aggregate of all the separate deposits, remained intact throughout the twelve years after the wrongful taking. Since the burden was on him, he was properly held not to have succeeded in tracing his money so as to impress it with a trust."

The situation is precisely the same here. The respondent has failed to trace his money into any specific fund and to show that any specific fund remained intact after the receipt of the liquidating dividend by the deceased. (It would do violence to the facts to say that decedent was guilty of any wrongful taking.)

As stated by this Court in the case quoted from on page 30 of our main brief, even in cases where the exaction is illegal the trust fund doctrine, to use the words of this Court,

> "does not impress an indelible trust upon all funds which the wrongdoer and his successors may thereafter have on deposit in their banks."

Respondent seems to contend that it does.

There being no proof in this case that the executor received any of the trust property, recovery could not have been had against him even had a claim been presented by the respondent during the time he was executor. The legatee being one step farther removed from the decedent than the executor, no recovery may be had against him for the reason that it not appearing the executor received any of the taxpayer corporation's property, it does not appear that the legatee, whose distribution came from the executor, received any.

Thus on the merits of the case respondent must fail.

THE DISCHARGE OF THE EXECUTORS PREVENTS THE MAINTENANCE OF A PROCEEDING AGAINST THEM AS EXECUTORS.

On page 10 of its brief respondent states:

> "Whether or not the executor is liable for taxes assessed after his discharge is a matter of congressional intent."

No statute is cited or quoted (other than the one previously referred to and which we say has no application here because it is not retroactive) which imposes any liability on these executors. It is conceded in the respondent's brief that *Section 280* does not impose any liability and that the reference in the opinion of the Circuit Court of Appeals to the liability "created and defined by the statute" cannot be defended. On page 9 of its brief the Government states:

> "Petitioner contends, in short, that the discharge of the executors and distribution of the estate barred the Government from asserting any claim against the executors in their representative capacity. *It is submitted that this circumstance cannot bar the United States from the collection of taxes to which it is entitled.*" (Italics ours.)

We have put the second sentence of the Government's statement in italics because it has no necessary relation to the first sentence of the statement. It illustrates a fundamental fallacy in the Government's argument, which assumes that in contending that the discharge of the executors and the distribution of the estate prevents an action against them as executors, we are thereby contending that it operates as a general statute of limitations and destroys the right of the Government to collect its taxes. (See pages 15 and 16 of Government's brief.) To maintain our argument that after their discharge the executors could not be sued as such we could assume, without conceding, that it did not operate as a statute of limitations and did not bar whatever remedy the Government might have against the legatees or distributees. To put it another way, our contention is that the discharge of the executors and the distribution of the estate destroys the right to subsequently bring an action against them as executors just as the death of a natural person destroys the right to subsequently maintain an action against him. The conclusion that it does, does not involve the conclusion that the right of the creditor to recover is barred, nor the statute of limitations. The right may not be barred for the reason that the creditor may have the right to maintain an action against some existing person, such as a legatee, for the enforcement of his right. Neither the death of a natural person nor the extinction of an estate have any effect on the statute of limitations but do prevent an action against the extinct entity.

In *Forrest v. Jack, 294 U. S. 158,* this Court said, at *page 163:*

> "In the absence of federal enactments relating to procedure for enforcement of the liability imposed

by §66, collection is to be made in accordance with state laws governing claims against estates of deceased persons at least to the extent that such laws are not inconsistent with enforcement of the liability imposed by national authority. There is no suggestion that the laws of the State of Utah discriminate against or are inadequate for the just and convenient enforcement of liability imposed, §66, against estates of deceased stockholders. There can be no liability on account of assessments made after complete administration, final distribution of all the property and the extinguishment of the estate.

In this case, the Comptroller's assessment was made more than eleven years after complete distribution and long after decedent's widow as distributee became the actual, though not the registered, owner of the stock and liable under §64. The decree of March 11, 1920, closed the estate. The fact that the administrator was not formally discharged until December 1, 1931, about the time the bank failed, is without significance here as the Comptroller's assessment was not made until March 8, 1932. As the estate had ceased to exist before the bank became insolvent, the Circuit Court of Appeals rightly held that petitioner as administrator was not required by Utah law *(Rev. Stat. 1933 §102-9-26)* to retain or pay into court any property or money to cover possible future liability in respect of the stock that had been decreed and distributed to the widow. There is nothing to support the allegation of *devastavit.*"

Apparently the reason *Section 3467 of the Revised Statutes* (discussed at pages 22 to 24 of our main brief) was enacted was to make an executor personally liable if he distributed the assets of an estate after having notice of the Government's claim. A holding in accordance with the argument of the Government that it may sue an executor after distribution of the assets of the estate and after his discharge in effect assumes that *Section*

3467 was superfluous and that an executor who is not liable under the decisions referred to at pages 23 and 24 of our main brief construing *Section 3467*, is nevertheless liable without it.

To say that an executor of an estate which has been extinguished by decree of Court may be subsequently sued as executor is analogous to saying that a dead person may be sued after his death.

The case of *Evans, 12 B. T. A. 334*, relied upon on page 16 of the Government's brief, proceeds upon the same mistake which the Government makes here, viz.: that the contention that a discharged executor may not be sued is the same contention as the statute of limitations whereas in reality the statute of limitations is no more involved in this contention than it is in the contention that a dead man may not be sued after his death. So far as the *Evans case* puts the liability upon *Section 3467 R. S. (p. 338)* it may be sound for it may be that in that case the executor had notice of the Government's claim while acting as such. The *Kaufman case, 15 B. T. A. 141*, merely cites and follows the *Evans case* and in that case the point apparently was not raised in the Circuit Court of Appeals. Both of these cases are distinguished by the Board of Tax Appeals in its opinion in the case at bar (Rec. 78).

RESPONDENT HAS MISAPPREHENDED THE ILLINOIS LAW.

As we understand the argument of the respondent, it is to the effect that under the Illinois law he could have recovered for this claim against the executors. There could have been no recovery for this claim under the provisions of the Illinois law. The Illinois law is that claims not

presented within one year from the issuance of letters are forever barred, with two exceptions not material here. One of these exceptions is designed to cover such assets as may subsequently turn up and claims presented after one year are not barred, but are only payable out of the uninventoried portion of an estate. (It is not suggested that there was any such property in the case at bar.) The other claim which is not barred is a contingent claim which does not accrue in time to present it within one year. It is this character of claim which is discussed in the quotation from the Illinois case on page 13 of respondent's brief as appears from the quotation itself. In the case of such contingent claim, however action may not be maintained against the executor but must be maintained against the person to whom the property has been distributed. For example, in *Mortimer v. Potter, 213 Ill. 178,* Potter held the property as Trustee and had received notice of the Government's claim during the time he held it.

The Illinois law as it now exists, is clearly stated in the case of *Sanders v. Merchants State Bank, 349 Ill. 547.* In this case the first opinion was withdrawn and the opinion is the one rendered on rehearing. Due to the division in the Court the case was carefully considered and it has not been modified in any way. At pages *564, 565. 566* and *567,* it is said:

> "The case of Martha Barron is different from that of any other appellant. It is not based on her liability as a stockholder, for she was never the owner of any stock in the bank. Her husband, Robert Barron, was the owner of twenty shares from the time the bank was organized, in May, 1900, and became the owner of twenty additional shares on February 19, 1914. He continued to own the forty shares until January 28, 1925, when he transferred them, nearly six years be-

fore the bank failed. About two and a half years later, on September 3, 1927, he died, leaving a will by which he gave all his property to Martha, his widow, and she received under the will personal property of the value of $5500 and real estate of the value of $11,000. His will was admitted to probate and record on October 5, 1927, and the estate was finally settled and the executrix discharged on October 23, 1928, over two years before the failure of the bank. The theory on which the decree against Mrs. Barron was predicated is, that in addition to his investment in the stock of the bank, which, of course, was liable for all the bank's debts, her husband was personally and individually liable, to the extent of his stock, for every debt of the bank which accrued during the time he owned the stock, that this liability was in no way affected by the transfer of his stock, but continued to the extent mentioned, until every debt which had so accrued was paid, and that upon his death leaving any such debt unpaid it further continued to be a liability against his estate to the amount of the stock he owned. Assuming all this to be true, any depositor of the bank during his ownership of the stock having made a demand of payment might have sued him for the amount of his deposit under the constitutional imposition of liability on him, and any other creditor whose claim accrued during his ownership of the stock, and was due, might have sued him without any demand. So if, after Barron's death, a creditor of the bank had exhibited a claim against his estate within one year after the date of the letters testamentary issued to his executrix there would have been no valid defense to the extent of Barron's stock. However, the *sixth clause of section 70 of the Administration Act* provides that all demands not exhibited to the court within one year from the granting of administration shall be forever barred unless the creditors shall find other estate of the deceased not inventoried or accounted for by the executor or administrator, in which case their claims shall be paid *pro rata* out of such subsequently discovered estate. This provision

creating a limitation upon the time for filing claims against an estate is not a general statute of limitations. The purpose of the act in regard to the administration of estates was to facilitate their early settlement, and the limitation for the exhibition of claims to two years (a time afterward reduced to one year) had that particular purpose in view. A claim not exhibited within the time fixed is not absolutely barred but its right to participate in the distribution of the assets of the estate actually inventoried or accounted for is lost. *(Waughop v. Bartlett, 165 Ill. 124; Gross v. Estate of Thornton, 286 id. 185; Durflinger v. Arnold, 329 id. 93.)* The rule is applied in equity as well as at law, and while a mortgagor may foreclose his mortgage in equity after two years without presenting to the administrator or the court the note or other obligation secured by it, he cannot have a deficiency decree for participation in the assets of the estate which have been inventoried or accounted for. *(Mulvey v. Johnson, 90 Ill. 457; Kittredge v. Nicholes, 162 id. 410; Waughop v. Bartlett, supra.)* Therefore, if the creditors of the bank had such a claim against Barron as could have been presented and allowed against his estate, the failure to present it within the time fixed by the statute is a bar to a recovery by any other proceeding. It was held in *Ryan v. Jones, 16 Ill. 1,* that the personal estate of a decedent is primarily liable for the payment of his debts and must be exhausted before resort can be had to the real estate. 'Demands against the estate of a deceased person must be exhibited within two years from the grant of administration. A creditor free from disability who fails to present his claim within that time is not allowed to participate in the proceeds of the personal estate previously inventoried or accounted for by the executor or administrator. He must satisfy his debt out of property subsequently discovered or inventoried.'

The defense as to the claim against Mrs. Barron rests entirely upon *Section 70 of the Administration Act* and the failure to exhibit the claim against the

estate of her husband within a year from the date of issue of letters testamentary. The appellees' answer to this defense is that the creditors were unable to exhibit their claims during the administration of the estate because during the whole time of one year after the issue of letters testamentary they were mere contingent liabilities and not obligations of the estate, and therefore could not be allowed or considered in the settlement of the estate. In *Union Trust Co. v. Shoemaker, 258 Ill. 564,* and in *Chicago Title and Trust Co. v. Fine Arts Building, 288 id. 142,* it was held that the limitation of *Section 70* did not apply to actions against heirs, devisees or legatees to subject property of the estate received by them to the payment of contingent liabilities of the estate. The claim which was held in the first of these cases to be a mere contingent liability and not a fixed obligation of the estate was upon a replevin bond executed by Walter Shoemaker, a partner in the firm which was plaintiff in the replevin suit, to the sheriff having the writ with the conditions usual in such bonds. The property was taken by the sheriff by virtue of the writ and delivered to the plaintiffs. Fifteen years later the case was tried and resulted in a judgment in accordance with the law of Michigan, where the case was pending, for $39,341.45. In the meantime, Shoemaker, who lived in Chicago, died testate in 1900, his will was admitted to probate and letters testamentary were issued, his executor and executrix settled his estate, filed their final account and were discharged September 28, 1904, and the estate was distributed. A little over two years later a bill in equity was filed against the executor and executrix of the will, who were the residuary devisees and had each received more than enough of the assets of the estate to pay the amount sought to be recovered. Shoemaker having died before judgment, of course no judgment was or could be rendered in the replevin suit against him or his estate. There was no breach of the bond until judgment was rendered, and before that occurred the liability was entirely contingent.

There was a potential liability on the bond but no actual liability until the breach by failing to prosecute the suit with effect. Until that time there was no liability, present or future, to pay, and, of course, none for which any claim could be exhibited or prosecuted. The liability was dependent on an event which neither party could control and was therefore contingent. In the other of the cases cited the claim was for installments of rent upon a lease to the deceased for a term of ten years at a rent of $2166.67 a month. The lease was assigned with the consent of the lessor, the assignee assuming the liability of the lessee. The assignee died in the fifth year of the term and the lessor exhibited against his estate a claim for the installments of rent for the remainder of the term, but it was held that the claim was contingent because there were contained in the lease contingencies, the happening of which was not within the control of either party, which might defeat all right to recover rents; as, for instance, a provision that in case of such damage by fire as to render the building untenantable a failure to repair in thirty days should entitle the lessee as well as the lessor to terminate the lease, or a provision that in case the lessor desires to rebuild the buildings he may terminate the lease. In both these cases the claim was contingent because it was entirely uncertain whether there would ever be any liability.

It is said that a creditor of the bank was prevented from exhibiting his claim against the estate of Robert Barron because it was not due until demand of payment was made of the bank and refused. The creditor was not so prevented from exhibiting his claim. He could have demanded payment of the bank at any time and payment would either have been made or refused. It was his own *laches* which prevented his obtaining the allowance of his claim against Barron's estate. There was no obstacle, except his own will, in the way of his making a demand on the bank. He chose not to exhibit his claim or make de-

> mand for its payment. If it was necessary for him to make a demand and he failed to make it, the absence of a demand might be a defense to his claim; but he could not allege his refusal to make a demand during the whole period of a year from the date of the letters testamentary to bar the defense of *Section 70 of the Administration Act*, by showing that he was prevented from exhibiting his claim by reason of the fact that it was contingent and that he had refused to remove the contingency by making a demand at the bank. It would be most inequitable to permit creditors who could with a breath remove the supposed obstacle to the prosecution of their claims, to remain inactive, to refuse even to demand payment of the bank, and by their neglect to pass on a liability to future generations."

No Illinois case holds that except as to a contingent claim there may be recovery on any claim not presented within one year from the issuance of letters except against property not inventoried. (No such property existed in the case at bar.)

The Illinois cases cited on page 12 of the respondent's brief do not touch the point. In the case at bar the estate was fully settled. A claimant cannot bring in a claim years afterwards and claim that the estate has not been fully settled because his claim was not presented and allowed. *Starr v. Willoughby, 218 Ill. 485,* was a case where a will gave an executor power to sell real estate. In holding that he had power to make the sale after his discharge the Court said, at pages *491* and *492:*

> "When an executor resigns or is removed, his power as Trustee, which devolves upon him by virtue of his executorship only and not by express appointment as Trustee to sell real estate, is revoked."

If the power to sell the real estate had not been expressly given in the will, the executor could not have made the sale, as the above quotation states because his power as executor was revoked.

The case of *Maguire v. City of Macomb, 293 Ill. 441*, was a case which involved the question of the right of an executrix to file and maintain a bill to remove a cloud on title after her discharge. The Court held that the will not only appointed the executrix as such but also appointed her a Trustee. (See page *452.)* It then held that she had a right to maintain the bill as Trustee:

> "Defendant in error is executrix and Trustee under the will, and it is immaterial that the decree orders her to proceed as executrix although in the bill she is described as Trustee merely." (p. *453.*)

The respondent's attempted distinction of *Lindley v. United States, 59 F. (2d) 336 (C. C. A. 9th)*, at page 17 of its brief, must fail because under the Illinois law if the estate is closed without payment of a debt not presented within one year, the creditor has no remedy except in the case of contingent claims* and except as to uninventoried property which two exceptions do not obtain here. We do not extend this brief by quoting from this case on the alleged liability of a discharged executor, and instead of quoting it, ask your Honors to read it at this point.

At the bottom of page 28 and top of page 29 of his brief the respondent discusses *subdivision (f) of Section 280*, which reads:

> "As used in this section, the term 'transferee' includes heir, legatee, devisee and distributee".

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* This tax was not a contingent claim. Hutton v. Commissioner, 59 F. (2d) 66, 69 (C. C. A. 9th); Uncasville Mfg. Co. v. Commissioner, 55 F. (2d) 893, 895 (C. C. A. 2nd).

Obviously reference must be had to the term "transferee" as previously used in *Section 280* in order to determine its meaning. The previous use of this word in the section is as follows:

> "The liability, at law or in equity, of a transferee *of property of a taxpayer*". (Italics ours.)

Manifestly a legatee may not be proceeded against under this section unless he is a transferee "of property of a taxpayer". This is fully demonstrated at pages 15 to 17 of our main brief. The decedent in the case at bar was not the taxpayer, but the Van Sicklen Company was the taxpayer. This is not a proceeding to collect a tax liability but rather a proceeding to follow trust funds, as fully shown on pages 15 to 17 of our main brief.

There is one more point which ought to be mentioned here. At the top of page 5 of its brief, respondent claims not only the $8,000 received by decedent, but this sum "plus 6% interest from February 26, 1926". It is not claimed that the decedent received more than $8,000. He was guilty of no wrongdoing. There is no showing that he used this $8,000 for his own profit. Hence, there appears no basis for a claim for interest. In *Pierce v. United States, 255 U. S. 398,* at page *406,* the Court reversed a decree which allowed interest and the observations therein seem pertinent here.

THE CIRCUIT COURT OF APPEALS SHOULD NOT HAVE CONSIDERED THE QUESTION OF PETITIONER'S LIABILITY AS A LEGATEE AND HELD THAT HE WAS LIABLE AS SUCH.

On page 31 of its brief the respondent criticizes the petitioner for failure to produce evidence to rebut facts which respondent claims proved *prima facie* that petitioner was liable as a legatee.

The burden of making a case before the Board of Tax Appeals was on the respondent and he did not proceed against petitioner as a legatee before the Board of Tax Appeals. This the Circuit Court of Appeals clearly stated in the extract from its opinion quoted at the bottom of page 27 of our main brief. Petitioner was proceeded against solely as an executor and because he considered that he was not liable as executor and that being the only basis of the proceeding before the Board, manifestly petitioner, who did not have the burden of proof placed upon him by the statute, did not go to the trouble of producing evidence to show that he was not liable as a legatee when it was not claimed that he was. If such evidence existed, it is manifest that it would be unfair for the Circuit Court of Appeals to consider and finally decide a ground of liability not asserted before the Board of Tax Appeals for the reason that petitioner had no occasion to meet it. Even if all respondent had to do to make a *prima facie* case against a legatee was not to prove that the legatee received any property of the taxpayer but that a decedent at some time received property of the taxpayer, then if a legatee could prove, for example, that the decedent invested the specific property in a municipal bond (a legal investment for trust funds) and that the bond had defaulted and shrunk to nothing, he would be exonerated or if he could prove that the property of the taxpayer corporation sought to be pursued was not transferred to him but to some other legatee he would not be liable. He might also prove that the deceased transferee during his lifetime innocently transferred the trust property to A without consideration, in which case A would be the proper person for the respondent to proceed against. There are other things which might be proved in defense of the alleged *prima facie* case, but manifestly a legatee

against whom no claim is asserted, knowing that the respondent has the burden of proof, will not go to the trouble of rebutting a claim which there is no attempt to make against him.

If the Circuit Court of Appeals ever has the right to hold a taxpayer liable on a ground not presented to the Board of Tax Appeals and which he had no occasion to meet, it is only where the facts and circumstances clearly manifest that there would be no possibility of a defense.

While as indicated in our brief and in respondent's brief, the cases are in conflict on the right of the Circuit Courts of Appeal to consider a question not raised before the Board of Tax Appeals, it seems to us that the true rule is that under the statute the Circuit Court of Appeals has the right and power when such a question is raised, in its discretion, to remand the decision of the Board and direct the Board to consider the question not presented to it, but that this is the limit of its right. For it to proceed to consider and decide on the merits against a party a question not raised below and which there was no attempt to meet, and which might possibly have been met, is in effect to deprive a party of his day in court.

On pages 19 and 20 of its brief the respondent says that persons who petition the Board for redetermination "are estopped from questioning either the jurisdiction of the Board or the sufficiency of the notice".

So far as the jurisdiction of the Board is concerned it must be conferred by statute or it does not exist and the right to question it at any time is akin to the right to question the jurisdiction of the District Court of the United States. The matter of estoppel rests upon the

equitable principle that one who has made a representation and induced another to rely thereon cannot thereafter change the representation to the damage of the one relying thereon. An analysis of the cases cited by respondent on page 19 will generally show that a petitioner appealed to the Board and by concealment of a material point induced the Commissioner to do nothing until after the statute of limitations had run and then attempted to shift his position or take advantage of a point hitherto concealed. Such is not the case in the case at bar. The discharge of the executors was pleaded in the petition and a copy of it annexed thereto. The rule of estoppel is not a rule of thumb or a magic formula. Before it can be invoked the well known equitable reasons which underlie it must be present. The party relying upon it in tax cases has the burden of making it clearly appear. (*Helvering v. Brooklyn City R. Co., 72 F. (2d) 274 (C. C. A. 2d); Brewerton v. United States, 9 F. Supp. 503 (Ct. Cl.)*)

For the reasons stated on page 34 of our main brief, this Court should be cautious in holding that a petitioner loses rights by exercising the statutory remedy of appeal to the Board of Tax Appeals. As developed on page 34 of our main brief, to so hold would in some cases thwart the purpose of the legislation creating this Board.

The objection to the consideration by the Circuit Court of Appeals of the claim against the legatee is not based on the address of the letter alone but on the entire letter, from the address to the signature. Nowhere in this notice of deficiency is there a claim against a legatee. As pointed out on page 28 of our main brief, the claim against the legatee was first made in January, 1934, almost fourteen

years after the Van Sicklen Company became liable for the tax and ten years after Hulburd's death. The allowance of a claim made so belatedly has the effect of preventing its deduction in computing the estate tax due from an estate which was long ago paid and the refund of which is barred by limitation. Furthermore, as stated on page 23 of the respondent's brief, it cannot be told from the opinion of the Circuit Court of Appeals whether it intended to limit petitioner's liability to $4,000 or to hold him for $8,000.

For the foregoing reasons or any of them the decision of the Circuit Court of Appeals should be reversed and the decision of the Board of Tax Appeals affirmed.

All of which is respectfully submitted.

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